

ORIGINAL

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Supreme Court, U.S.
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SUPREME COURT, U.S.

WILLIAM J. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General

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12 p/17

QUESTION PRESENTED

Whether the district court was required to notify the defendant in advance that it intended to depart upward from the range of sentences prescribed by the Sentencing Guidelines.

(I)

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A7, is reported at 893 F.2d 1343.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing with suggestion of rehearing en banc was denied on March 15, 1990. Pet. App. A16-A17. The petition for a writ of certiorari was filed on April 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the District of Columbia, petitioner was convicted on one count of theft of government funds, in violation of 18 U.S.C. 641; one count of making false claims against the government, in violation of 18 U.S.C. 287; and one count of attempting to evade the payment of income taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to 60 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. Between 1982 and 1988, petitioner used his position as a supervisor in the Financial Management Section of the Agency for International Development (AID) to divert AID funds from an unused travel account to a bank account in the name of Vincent Kaufman. Petitioner justified these disbursements as payments to Kaufman for moving furniture for AID. Kaufman, however, did not exist; petitioner controlled the Kaufman account. In all, petitioner diverted approximately \$1,200,000 to his own pocket through the scheme. Petitioner failed to pay \$475,685 in federal taxes on the income he received through the embezzlement scheme. Pet. App. A2; Gov't C.A. Br. 3.

Petitioner agreed to plead guilty pursuant to a plea agreement with the government. In the agreement, the parties stipulated that petitioner would be sentenced under the Sentencing Guidelines and that petitioner's offense level under the Guidelines would be set at 19 and his criminal history category at I. The presentence report prepared by the Probation Office

agreed with that calculation. Based on those figures, the Guidelines provided for a sentence of 30 to 37 months' imprisonment. Pet. App. A3.

At the sentencing hearing, petitioner's counsel urged the district court to impose a sentence within the Guidelines range. Gov't C.A. Br. 4. The district court declined to do so. It departed upward from the Guidelines range because petitioner's offense was of unusual duration, because petitioner had abused the process on which the government relied to pay legitimate vendors, and because petitioner's evasion of income taxes allowed him to conceal his theft of government funds. For these reasons, the district court sentenced petitioner to 60 months' imprisonment. Pet. App. A3. Petitioner did not object to the district court's failure to inform him that it was considering an upward departure from the Guidelines range, nor did he object that the grounds of departure came as a surprise.

2. The court of appeals held that the district court's grounds for departing upward from the Guidelines range were proper and that the sentence imposed was reasonable. Pet. App. A4-A5. The court of appeals further held that the district court did not err by failing to notify petitioner in advance that it planned to depart from the Guidelines range or of its basis for doing so. Pet. App. A6. It found nothing in Federal Rule of Criminal Procedure 32 or the Guidelines themselves that required such notice. Moreover, the court of appeals reasoned that petitioner was not harmed by the lack of notice because he had an

opportunity to address the court prior to sentencing and because he had the right to appeal his sentence. Finally, the court noted that all of the facts that formed the basis for the district court's decision to depart were contained in the presentence report and petitioner had the opportunity to challenge any of those facts if he thought they were erroneous. Pet. App. A6.

ARGUMENT

Petitioner contends that the district court violated Federal Rule of Criminal Procedure 32(a)(1) and Sentencing Guideline 6A1.3 by failing to give him advance notice of the court's intention to depart from the sentence prescribed by the Sentencing Guidelines and an opportunity to comment on the grounds for the proposed departure. Pet. 8-14. The court of appeals' decision is correct and does not warrant this Court's review.

1. Federal Rule of Criminal Procedure 32 governs the imposition of sentence. Rule 32(a)(1) requires that counsel for both the defendant and the government be provided with notice of the probation officer's determination of the applicable sentencing classifications and guideline range and be afforded "an opportunity to comment upon [that] * * * determination and on other matters relating to the appropriate sentence." Rule 32(c)(3)(D) provides that the court must make findings resolving all factual disputes that might bear on the sentence. And Rule 32(a)(1)(B) & (C) requires the court to hear the defendant's and

counsel's allocution on matters relating to the sentence. Sentencing Guideline § 6A1.3 correspondingly provides that the parties shall be granted adequate opportunity to contest any factor important to the sentencing determination and requires the court to notify them of its tentative findings and give them an opportunity to object before sentencing.^{1/}

The district court fully complied with those provisions in this case. The circumstances of petitioner's offenses were undisputed and were set forth in the presentence report. The parties stipulated to petitioner's offense level and criminal history category in the plea agreement, and petitioner and his counsel had an opportunity to comment on the presentence report prior to sentencing. At sentencing, petitioner's counsel discussed the nature of petitioner's offenses at length and urged the court to impose a sentence within the Guideline range. As the court of appeals observed, "[t]his is not a case in which the court is going beyond the facts in the presentence report in deciding to depart from the Guidelines." Pet. App. A6.

2. Petitioner nevertheless contends that the district court was required to inform him that it was considering departing upward from the presumptively applicable range prescribed by the Sentencing Guidelines. Neither Rule 32(a)(1) nor Sentencing

^{1/} Guideline § 6A1.3 provides in part:

When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.

Guideline § 6A1.3 imposes such a requirement. As the court of appeals explained, "[a]lthough the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make the best case." Pet. App. A6.

Rule 32(a) is consistent with pre-Guidelines practice on this point. Prior to the promulgation of the Guidelines, district courts were not required to inform a defendant of the grounds on which the court intended to rely in imposing a sentence. Nothing in the Guidelines or the amendment to Rule 32 that accompanied their enactment created the requirement that petitioner seeks.^{2/}

An additional protection against an unreasonable departure -- unavailable to defendants in pre-Guidelines practice -- is the statutory provision for appellate review of the reasonableness and legality of any departure. See 18 U.S.C. 3742; see also United States v. Diaz-Villafane, 874 F.2d 43, 4950 (1st Cir.), cert. denied, 110 S. Ct. 177 (1989). In this case, for example, petitioner claimed on appeal that the district court relied on

^{2/} In addition to his claims based on Rule 32 and Guideline 6A1.3, petitioner also asserts that the district court's failure to give explicit notice of its intention to depart violated the Due Process Clause. Pet. 9-10 n.5 & 13. This contention is without merit. Petitioner makes no claim that the information on which his sentence was based was unreliable, see Williams v. Oklahoma, 358 U.S. 576, 584 (1959), and the district court's compliance with Rule 32 ensured that petitioner had a meaningful opportunity to address the court regarding his sentence.

impermissible factors in deciding to depart. The court of appeals fully considered petitioner's arguments and rejected them. Petitioner does not seek review of that aspect of the judgment below.

Petitioner contends, Pet. 8-9 & n.6, that the court of appeals' decision conflicts with the decisions of the Second, Fifth, and Ninth Circuits, which have held that Rule 32(a)(1) requires a sentencing court to inform a defendant of its intention to depart and of the factors on which it intends to rely to support the departure. See United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1980); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989).

The decision below does not conflict with the decisions in those cases, however, because petitioner waived review of the adequacy of the district court's notice by failing to object at the sentencing hearing. As the government urged in the court of appeals, petitioner "did not object to the district court's failure to inform him of the grounds on which it proposed to depart from the Guideline sentence, and thus he is foreclosed from raising this claim in this Court. 'Any procedural objections to the sentencing hearing * * * are deemed waived by the lack of timely objection.' United States v. Valasquez, 868 F.2d 714, 715 (5th Cir. 1989)." Gov't C.A. Br. 24.

In any event, the division among the courts of appeals on the merits of the notice issue is not as sharp as petitioner

contends. In United States v. Cervantes, supra, the Second Circuit noted only that it had "serious concerns" about notice and opportunity to be heard when the district court misinformed a defendant concerning its intention to depart from the Guidelines and relied on matters not found or "highlighted" in the record. 878 F.2d at 55-56. In United States v. Otero, supra, the Fifth Circuit required the district court to give notice of its intention to depart only when the factors on which it intended to rely were not identified in the presentence report. 868 F.2d at 1415; see United States v. Michael, 894 F.2d 1457, 1461-1462 (5th Cir. 1990) (no requirement that court must give notice to defendant prior to sentencing of intention to ignore recommendation in presentence report). Here, all of the facts on which the district court relied to justify departure were set forth in the presentence report. Thus, only the Ninth Circuit's approach is at odds with the holding of the court of appeals in this case. And that court's ruling, we submit, was based on a misreading of Rule 32(a) and 18 U.S.C. 3553(d). As the court of appeals in this case pointed out, nothing in Rule 32(a) requires the court to advise the defendant that it may choose to give a sentence above the Guidelines range, and Section 3553(d) imposes no general notice requirement, but applies only to cases in which the court imposes an "order of notice" requiring the defendant to notify victims of the crime concerning the defendant's conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1990

^{*/} The Solicitor General is disqualified in this case.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by first class mail on June 11, 1990.

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